

(2002) 08 BOM CK 0061

In the Bombay High Court

Case No : Appeal No. 284 of 2002 in Arbitration Petition No. 499 of 2001

BFIL Finance Ltd.

APPELLANT

Vs

G. Tech Stone Ltd.

RESPONDENT

Date of Decision : 07-08-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(1), 31(2), 34, 36

Citation : (2002) 4 ALLMR 646 : (2003) 1 ARBLR 184 : (2002) 6 BomCR 573 : (2002) 4 BOMLR 449 : (2002) 4 MhLj 434

Hon'ble Judges : Nishita Mhatre, J;H.L. Gokhale, J

Bench : Division Bench

Advocate : Shyam Divan and C. D."Souza, instructed by Crawford Bayley and Co, for the Appellant; Janak Dwarkadas and Arif Doctor, instructed by Hariani and Co., for the Respondent

Final Decision : Allowed

Judgement

H.L. Gokhale, J.—This appeal seeks to challenge the order dated 27th and 28th November 2001 passed by a learned Single Judge allowing the Arbitration Petition filed by the respondents thereby setting aside the majority award dated 14th June 2001 given by an Arbitral Tribunal of 3 judges.

2. The facts leading to this appeal are as follows :--

The respondents are a public limited company of Chennai engaged in the business of export of stones, granite slabs, etc. The appellants are engaged in the business of finance and investments. The respondents and the appellants entered into an Agreement on 2nd February 1995 by virtue of which the respondents placed with the appellants 5,40,000 Secured Optionally Fully Convertible Debentures (OFCDs) and the appellants paid a sum of Rs. 5,13,00,000 (Rupees Five Crores Thirteen Lacs) to the respondents. Later on 21st September 1995 the appellants invoked Article II Clause 2.7 of the Agreement and asked the respondents to redeem the OFCDs and sought the redemption proceeds along with the interest. The respondents refused to comply

and wrote on 1st November 1995 that the offer of redemption was not acceptable and asked the appellants to return the debenture certificates in exchange for shares of the respondents since they had converted the OFCDs into their equity shares. Thereafter controversies started between the parties and the appellants terminated the Agreement by sending an Advocate's notice. Thereafter in terms of Clause 8.2 of Article 8 of the Agreement, the appellants appointed their arbitrator but since the respondents did not appoint their arbitrator, an application was made u/s 11(4) of the Arbitration and Conciliation Act, 1996 and the then Hon"ble Chief Justice by his order dated 6th August 1997 appointed a co-arbitrator and a presiding arbitrator. Thus the Arbitral Tribunal consisted of three judges. Two of the judges [i.e. Presiding Arbitrator Hon"ble C.J.I. (Retd.) Kania J. and Hon"ble C.J. (Retd.) Pendse J.] gave the majority award on 14th June 2001 which is annexed at Exhibit-V to the appeal compilation. The minority award [per Hon"ble Pratap J. (Retd. C.J.)] was also given on the same day which is annexed at Exhibit-W to the appeal compilation. Thereafter in view of differences in the Arbitral Tribunal, all the three learned Judges signed the following final operative award on 14th June 2001 :--

"As per the majority award, the respondents are ordered to pay to the Claimants the sum of Rs. 8,10,00,000.00 (eight crores and ten lakhs) within two months, from today failing which the said amount will carry interest thereafter at the rate of 15 per cent per annum till payment or realization, whichever is earlier."

3. It is material to note that in the Arbitration Petition, it is the majority award (Exhibit-V) which is challenged as per its prayers and not the final operative award (Exhibit-X) signed by all the arbitrators. Before the learned Single Judge, it was canvassed that the majority award was against public policy and that is how Section 34(b)(ii) of the Arbitration and Conciliation Act was attracted. It was submitted that there was a non-application of mind to the facts and the law and thereby there was violation of principles of natural justice which form a part of the public policy and that is how the award was bad. This submission was on the footing that the issue of limitation raised by the respondents was ignored. As far as the appellants are concerned, it was submitted on their behalf that what was challenged before the single judge was only the majority award and not the final award signed by all the three judges. It was also submitted that the concept of public policy cannot be extended and that the scope of Section 34 was a limited one.

4. These submissions of the appellants were rejected and the learned Single Judge amongst others held as follows:--

"It is a settled law that observance or principles of natural justice by every adjudicating authority in India is necessary. In my opinion it can be safely said that the observance of the principles of natural justice by an adjudicating authority which is adjudicating on the rights of rival parties including Arbitrators is public policy of India. It is also settled principles of law that non application of mind by any adjudicating authority to the relevant facts and law amounts to

breach of principles of natural justice."

5. Thereafter short of saying that the majority award was a perverse one, the learned Judge observed as follows:--

"Taking into consideration by an adjudicating authority, any irrelevant facts and law amounts to breach of principles of natural justice. Similarly omission from consideration of relevant facts and law also amounts to breach of principles of natural justice. In the present case, the Arbitrators have clearly failed to take into consideration the factors that were necessary for recording a finding that because of the provisions of Clause (xii) the respondent was entitled to terminate the contract. In fact for recording a finding that the respondent was entitled to terminate the contract, the finding that the petitioner has failed to come out with a public offer was absolutely necessary."

6. Mr. Divan, learned counsel appearing for the appellants, submitted that under the Arbitration and Conciliation Act when award is obtained, it is executable as if it were a decree of the court u/s 36 of the Act. It is therefore the operative final award signed by all the three judges which is to be executed and which is to be challenged if one is aggrieved by that. He laid emphasis on Section 31 of the Act and particularly Sub-sections (1) and (2) thereof, which read as follows:--

"31. From and contents of arbitral award.-- (1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal. (2) For the purposes of Sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated."

Mr. Divan pointed out that although a chamber summons was moved for amendment, even after the amendment what was challenged was only the award signed by the two judges which in fact consisted of their reasoning. The final operative award signed by all the three judges was not challenged.

7. The second submission of Mr. Divan was that as far as Section 34 of the Act is concerned, it is a Section which has been interpreted by the Apex Court as well as by a Division Bench of this Court to lay down that the scope of interference is limited one and one has got to make out a specific case as far as public policy is concerned. He drew our attention to the observations of the Division Bench in the case of Vijaya Bank Vs. Maker Development Services Pvt. Limited, wherein the Division Bench observed that the principles of public policy cannot be stretched to include ideas like that of natural justice.

8. The third submission of Mr. Divan was that what the learned Single Judge had done was to reappraise the evidence. The above referred quotations from the order passed by the learned Single Judge clearly amount to his coming to the conclusion that the award was bordering on to perversity. He drew our attention to the observations of the learned Single Judge in the earlier paragraphs of the

order with respect to various clauses of the Agreement and submitted that this is nothing but substituting his own view in place of the Arbitrator and that was impermissible. As far as this aspect is concerned, he relied upon a judgment of the Apex Court in the case of M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, , where the Apex Court held that the court cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties and if the view of the arbitrator is a possible view, the award or reasoning contained therein cannot be examined. Another judgment relied upon by him was an earlier one in the case of Hindustan Tea Co. Vs. K. Sashikant Co. and Another, , wherein the Apex Court held that the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion.

9. He also drew our attention to various provisions of the CPC to emphasise the difference between the judgment and decree, particularly the provisions of Sections 2(2) and 9 of the CPC read with Order XX Rule 4(2) and Order XX Rule 6(1). He drew our attention to some of the relevant passages of the Apex Court from the judgments reported in R. Rathinavel Chettiar and Another Vs. V. Sivaraman and Others, and Balraj Taneja and Another Vs. Sunil Madan and Another, in this behalf.

10. Mr. Dwarkadas, learned counsel appearing for the respondents, on the other hand, submitted that Section 31(2) of the Act permits a situation whereunder there can be a situation where the award may not be signed by all the members of the Tribunal and still it ought to be construed as an award. His criticism on the submission of Mr. Divan was that it was a technical approach and that should not be permitted. He pressed into service the observations of Bachawat J. in his commentary on Law of Arbitration and Conciliation, Third Edition of 1999 at page 620, wherein the learned author has observed as follows:--

"A combined reading of Sub-sections (1) and (2) of Section 31 shows that an arbitral award is an award made in writing and signed by the majority of all members of the tribunal, together with the reasons for omission of any signature. A minority decision is not intended to form part of an arbitral award. It follows, therefore, that where reasons upon which the arbitral award is based are required to be stated u/s 31(3), the reasons are to be disclosed in relation to the majority award only. The dissentient view, not being an "arbitral award", may or may not be set out separately. The omission of the signature of the dissenter member should, however, be explained as needed u/s 31(2) by stating in the arbitral award the fact of dissension and whether the minority view is separately set out or not. Alternatively, the dissenter-member himself can make a statement to that effect so as to form part of the arbitral award, in compliance of Section 31(2)."

11. As far as the submission of Mr. Divan that the learned Judge had substituted his own finding was concerned, he emphasised the provisions of Section 28 of the Act to submit that the substantive law of the land has to be honoured. In his

submission, the law of limitation had to be kept in mind and has been ignored by the Arbitrators. Mr. Dwarkadas further submitted that the ideas of public policy have got to be read correctly. He drew our attention to a judgment of the Calcutta High Court in *Khetra Mohan Chatterjee v. Mohim Chandra Das* reported in 1913 Indian Cas 595 wherein it is observed as follows :--

"The maxim *quilibet potest renunciare jure pro se* introductory is restricted to legal provisions intended for the benefit of individuals, and does not apply to rules of law based, as are statutes of limitation, on public policy and general considerations."

12. As far as the role of the Arbitrator is concerned, while submitting that it is a limited one, Mr. Dwarkadas emphasized that the Arbitrators could not go outside the term of contract or create new ones. He submitted that the Arbitrators had gone on the basis of equity while ignoring law of limitation and in that they had exceeded their role. For that purpose, he drew our attention to paragraph 7 of the judgment of the Apex Court in the case of *State of U.P. Vs. M/s. Ram Nath International Const. Pvt. Ltd.*, and the observations in paragraph 5 in the case of *Continental Construction Co. Ltd. Vs. State of Madhya Pradesh*, .

13. Mr. Dwarkadas submitted that the respondents had a case u/s 34(2)(a)(iv) also inasmuch as in his submission, the Tribunal had dealt with a dispute which was not contemplated and had decided the matter beyond their scope and had violated Section 28 of the Act. In this behalf, he relied upon a judgment in the case of *Associated Engineering Co. Vs. Government of Andhra Pradesh* and another, and submitted that on that ground also this court ought to uphold the order of the learned Single Judge. It is however material to note that as pointed out by Mr. Divan, this submission was not raised before the single judge in this manner.

14. It was submitted by Mr. Dwarkadas that though the operative award is signed by three judges, he was expected to challenge the majority award which is the one at Exhibit-V and which is what he has challenged. He alternatively submitted that as far as Exhibit-V is concerned, he may request the learned dissenting judge to sign the same. In our view, this is not possible inasmuch as the learned dissenting judge has given his separate dissenting judgment/award.

15. Having considered the submissions of both the counsel, in our view, the provisions of Section 31(1) and (2) are very clear. It is ultimately the operative award which is executed u/s 36 of the Act and when Section 31(1) states that the award shall be made in writing and shall be signed by the members of the Arbitral Tribunal, it is the document signed by all the three of them which will have to be construed as the award of the Arbitral Tribunal and not the one signed by two or one who is dissenting. Section 31(2) provides for an exceptional situation, that is where the signature of a member of the Tribunal for some reason or the other is not available. This in fact supports what is provided u/s 31(1), namely that the final award is a document which is signed by all the

members of the Tribunal. This was clear to the members of the Tribunal and therefore after signing their reasoned awards separately, they have signed the common final operative award. Admittedly, the award signed by all three of them is not challenged in the arbitration petition filed by the respondents. Thus there is no challenge to the final operative award in the petition filed by the respondents. The challenge to the reasoned judgment signed by only two of them cannot be a substitute to a challenge to the final operative award. In the present case, we clearly have three documents on record; one signed by two of the judges which is a majority award, one signed by the dissenting judge and thereafter the final operative award signed by all three of them which specifically states that "for reasons recorded by them separately in the majority judgment", they were making the operative award. Inasmuch as that award was not challenged before the learned Single Judge, there was no challenge to the operative award as such and therefore there was no reason for the learned Single Judge to go into any other aspects of the matter. The act being an act passed to give sanctity to the arbitral proceedings, unless there is a challenge to the final operative award, a challenge to the reasoned award signed only by the majority members cannot be construed as a challenge to the final award under the garb of a liberal interpretation.

16. That apart, from the two paragraphs which we have quoted above, it is very clear that the learned Single Judge was substituting his own view over that of the Arbitrators. That was clearly outside his jurisdiction. It is quite possible that the learned Single Judge had another view of the matter. That is not the jurisdiction which is vested while looking into the question of the legality or validity of the award when it is challenged u/s 34 of the Act. Similarly as far as the question of public policy is concerned, by linking it with natural justice and thereafter linking it to law of limitation, the learned Judge has found fault with the majority judgment. This very approach has been criticized by a Division Bench of this Court in the case of Vijaya Bank (supra). In that judgment, the Division Bench clearly observed that the expression "public policy" cannot mean contravention of law simpliciter. That being the judgment rendered by a Division Bench, we are bound by the same and we have no reason to differ therefrom.

17. For the reasons stated above, in our view, the learned Single Judge had no reason to interfere with the award when in fact the award as such was not challenged before him. In the result, we allow this appeal and set aside the judgment and order of the learned Single Judge and thereby dismiss the arbitration petition filed by the respondents.

18. Mr. Dwarkadas applies for stay of this order. Mr. Divan states that for a period of 8 weeks, the appellants will not proceed to execute the award. The Statement is accepted.

19. Authenticated copy of this order be provided.